COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2015-SC-000570
(COURT OF APPEALS CASE NUMBER 2015-CA-000886-DD)

DENNIS CHAMPION — **APPELLANT**

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. KIMBERLY BUNNELL, JUDGE
15-XX-000006; 14-M-20356

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLANT, DENNIS CHAMPION

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Honorable Kimberly Bunnell, Judge, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Suite 521, Lexington Kentucky 40507; the Honorable Joseph T. Bouvier, Judge, Fayette District Court, 150 North Limestone, Lexington, KY 40507; the Hon. Ray Larson, Commonwealth's Attorney, 116 N. Upper Street, Lexington, KY 40507; the Hon. Jason Rothrock, Assistant County Attorney, 110 W. Vine Street, Lexington, KY 40507; the Hon. Carmen Ross, Assistant Public Advocate, 163 West Short Street, Suite 300, Lexington, KY 40507; and served by messenger mail to Hon. Andy Beshear, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on June 16, 2016. The record was not checked out in preparation of this Brief for Appellant.

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INTRODUCTION

Appellant Dennis Champion sought the review of this Court after the Kentucky Court of Appeals declined discretionary review of the Fayette Circuit Court's affirmance of the Fayette District Court decision upholding the constitutionality of the Lexington-Fayette Urban County Government's ordinance restricting panhandling in the municipality. This Court granted Mr. Champion's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant welcomes oral argument if this Court believes it would assist it in rendering a fair and just opinion in this case.

DESIGNATION OF RECORD

The record on appeal consists of one volume of trial record. Citations to the trial record will be made in "TR, [page number]" form. There is one video in the record, and citations to it will be made in "VR [date]; [time]" form.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

On December 8, 2014, at approximately 5:00 PM, Dennis Champion was cited, once again, for violating Lexington-Fayette Urban County Government (LFUCG) Ordinance 14-5, which prohibits begging and soliciting upon public streets. (TR 2). According to the citation, Mr. Champion had a homemade sign which he was holding that requested financial assistance and was standing holding the sign at the intersection of New Circle Road and Georgetown Street in Northern Lexington. *Id.*

Officer C.N. Brill cited Mr. Champion with violating the local ordinance, which reads:

Sec. 14-5. - Begging or soliciting alms or money prohibited; exception.

> (a) No person shall beg or solicit upon the public streets or at the intersection of said public streets within the urban county area.
> (b) Any person who violates any provision of this section shall be fined not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) or be imprisoned for not less than ten (10) days nor more than thirty (30) days or both for each offense.

Mr. Champion was given a court date for an appearance in District Court on the violation of the ordinance and was not arrested. *Id.* On January 27, 2015, Mr. Champion failed to appear and a warrant was issued for his arrest. (TR 3). On January 30, 2015, he appeared, with

counsel, in the Fayette District Court and was arraigned for violating the ordinance. (TR 6). At that time, his counsel challenged the legitimacy of the ordinance and was overruled by the District Court. (VR 1/30/15, *passim*). A conditional guilty plea was entered, preserving Mr. Champion's right to appeal the denial of his challenge to the legitimacy of the ordinance and its penalties. (TR 8). He was sentenced to three days in jail. (TR 6). The matter was appealed by Mr. Champion to the Fayette Circuit Court. (TR 8-9).

The Circuit Court, after receiving written pleadings by the parties, affirmed the District Court in a written opinion. (TR 52-63). The Circuit Court's Opinion addressed both challenges raised by Champion: the legitimacy of the county ordinance's act of levying jail time for violation and the abridgement of Mr. Champion's First Amendment right to freedom of speech by the enforcement of the ordinance. *Id.*

Mr. Champion sought discretionary review by the Kentucky Court of Appeals and was denied. (TR 150). He then sought the review of this Court, which was granted.

ARGUMENT

Once I built a railroad, I made it run
Made it race against time
Once I built a railroad, now it's done
Brother, can you spare a dime?

Once I built a tower up to the sun
Brick and rivet and lime
Once I built a tower, now it's done
Brother, can you spare a dime?

Once in khaki suits, gee we looked swell
Full of that yankee doodly dum
Half a million boots went sloggin' through hell
And I was the kid with the drum

Say, don't you remember, they called me Al
It was Al all the time
Why don't you remember, I'm your pal
Say buddy, can you spare a dime?

"Brother Can You Spare A Dime," Lyrics by E.Y. "Yip" Harburg, 1930.

I. THE TRIAL COURT ERRED IN HOLDING THAT THE ORDINANCE IS A LAWFUL EXERCISE OF POWER BY A COUNTY GOVERNMENT PURSUANT TO KRS 83A.065 AND KRS 500.020.

The first question raised in this case concerns whether a municipality may criminalize behavior or whether the General Assembly has reserved that power only for itself. The trial court cited two statutes as supportive of its determination that the ordinance was lawful.

Effective in 1975, KRS 500.020(1) reads:

> (1) Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime

> or violation under this code or another statute of this state.

KRS 83A.065(2):

> 2) A city may make the violation of any of its ordinances a misdemeanor or a violation by the express terms of the ordinance. When an offense is designated by ordinance as a misdemeanor, a criminal fine not to exceed the amounts set forth in KRS 534.040(2)(a), or a term of imprisonment not to exceed the periods set forth in KRS 532.090(1), or both, may be imposed for the offense. When an offense is designated by ordinance as a violation, a criminal fine not to exceed the amounts set forth in KRS 534.040(2)(c) may be imposed for the offense.

The fine amounts set forth in KRS 534.040(2)(a) are:

> (a) For a Class A misdemeanor, five hundred dollars ($500); or (b) For a Class B misdemeanor, two hundred fifty dollars ($250); or (c) For a violation, two hundred fifty dollars ($250).

The incarceration periods set forth in KRS 532.090(1) are:

> (1) For a Class A misdemeanor, the term shall not exceed twelve (12) months; and (2) For a Class B misdemeanor, the term shall not exceed ninety (90) days.

The ordinance at hand fails to nominate whether violations of its terms will be considered a misdemeanor or a violation, required by the plain language of the granting statute. It allows a fine of between $50 and $100 and/or a jail term of between ten (10) and thirty (30) days for

each offense. Per KRS 532.020, the offense outlined in the ordinance, though not so designated, is a Class B misdemeanor.

In the Circuit Court below, Mr. Champion cited Justice Cunningham's recent concurrence in a matter before this Court, *Johnson v. Commonwealth*. 449 S.W.3d 350 (Ky. 2014).

In *Johnson*, a case involving a dangerous dog ordinance hailing from Jefferson County, Justice Cunningham, joined by Justice Venters, observed that though the Supreme Court rarely is delivered the opportunity to consider the constitutionality of municipal ordinances, were that case to have presented a justiciable question preserved for review, the outcome would have been quite negative for Jefferson County.

> **It is clear that by enacting KRS 500.020(1), the General Assembly did not intend to share its exclusive authority to enact and define crimes and criminal penalties.** The express requirement that criminal offenses be designated by "another statute of this state[,]" is not satisfied by enacting a subsequent statute authorizing local governments to adopt their own criminal ordinances punishable by incarceration. **For an act or omission to constitute a criminal offense punishable by incarceration, such behavior must be specifically designated as a crime by statute.** *See Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky.2009) ("The power to define crimes and establish the range of penalties for each crime resides in the legislative branch."). For example, in *Taylor v. Commonwealth*, we held that a Kentucky insurance statute prohibiting insurance agents from misappropriating

> premiums was a criminal offense that was distinguishable from a similar provision in the penal code. 799 S.W.2d 818, 819–20 (Ky.1990). In so holding, we recognized that KRS 500.020(1) provided the foundation for that penal insurance statute because it constitutes a crime under "another statute of this state." Id. at 819 (citing KRS 500.020(1) (emphasis added)); see also KRS 258.235(5)(a) and KRS 258.990(3)(b) (animal control statutes providing criminal liability). Thus, KRS 500.020(1) does not sanction the abdication of authority embodied by KRS 83A.065(2).

449 S.W.3d at 355, (J. Cunningham, concurring)(emphasis added).

This Court has indicated it will not take lightly municipal grabs for power and stands at the ready to smite local governments for such overreach. The Circuit Court, at the same time both acknowledging Justice Cunningham's concurrence and then finding contrary, erred when it held that KRS 83A.065 controls because it is more specific, and failed to address Justice Cunningham's cogent point that the General Assembly was quite specific and clear when it passed KRS 500.020 prohibiting any other entity besides itself from enacting legislation that criminalizes behavior.

> It is readily evident under the judicial and legislative reforms of 1975 and 1976 that the General Assembly intended to create a unified and progressive criminal system. Therefore, it is difficult to conclude that by enacting KRS 500.020(1)—a statute intended to solidify legislative authority—the General Assembly simultaneously intended to abdicate that authority to local

> governments. Such an interpretation contradicts the plain language and legislative history of KRS 500.020(1), and would create an absurd result. *Maynes*, 361 S.W.3d at 924 (this Court presumes that the General Assembly did not intend an absurd result). To do so would permit the circumvention of our penal code by the creation of countless satellites of criminal law in the scores of municipalities and counties within our state. Accordingly, the General Assembly cannot circumvent KRS 500.020(1) by enacting KRS 83A.065(2).

Id. at 354 (J. Cunningham, concurring).

Perhaps most problematic is the Circuit Court's seeming failure to appreciate the import of allowing disparate cities to criminalize, or sanction by not criminalizing, behavior of inhabitants and visitors. One can imagine a Commonwealth where one need download various ordinances at the county line, should the Circuit Court here be upheld, to ensure one's compliance with rules for behavior that change every 15 miles. It is vital that the right to criminalize behavior for which one might have one's liberty taken remain with the representatives of *all* the people—the General Assembly.

> [T]he deprivation of a citizen's liberty by incarceration is neither a plenary nor piecemeal power of the Commonwealth's subdivisions; rather, it is the sole charge of the General Assembly, subject to the dictates of Kentucky and federal law. A rudimentary example of judicial process proves instructive.
>
> In our criminal system, the court may lawfully impose a sentence of

incarceration only after a jury unanimously finds the defendant guilty beyond a reasonable doubt. In contrast, the court may impose civil damages on a party after a majority of jurors assess liability on that party, typically by a mere preponderance of the evidence. Thus, when incarceration or confinement is at stake, the burden placed on the state is higher and the process that is due is greater. Kentucky Const. § 2; U.S. Const. Amendment XIV. This ancient principle guides not only the bench and bar, but all government institutions.

By further analogy, if the General Assembly ever vested local governments with the authority to enact felonies, the constitutional and public policy concerns would be immense. However, §§ 91.150 and 91.152 of the Ordinances authorize a maximum penalty of 12 months incarceration—the same minimum penalty authorized under a Class D felony. KRS 532.060(2)(d). In any event, it is not the duration of incarceration that offends the most basic notions of due process and liberty; rather, it is the mere act of authorizing confinement by an entity other than the state.

The authority to enact laws depriving citizens of their liberty by incarceration is the exclusive charge of the sovereign. In Kentucky, this authority is non-delegable and, therefore, may not be transferred to local governments. *Board of Trustees v. City of Paducah*, 333 S.W.2d 515, 518 (Ky. 1960) (holding that Kentucky does not recognize any inherent right to local government.). In arriving at this determination, I emphasize that this Court is unconcerned with the wisdom or efficacy of the General Assembly in enacting laws. Such concerns are the domain of the electorate. However, for a

> crime that carries a penalty of incarceration to satisfy the lowest threshold of constitutional muster, it must at least be a product of the legislature.

Id. at 354-55 (J. Cunningham, concurring).

In other words, a municipality may create additional penalties for violations of existing statutes which criminalize behavior, but may not create new crimes. The phrase "another statute of this state" is to be read as requiring the behavior the municipality is seeking to punish already be nominated a crime by the General Assembly in a statute.

> The power to define crimes and assign their penalties belongs to the legislative department. KRS 500.020(1) (common law offenses abolished); *Cornelison v. Commonwealth,* Ky., 52 S.W.3d 570, 573 (2001) ("discretion to define the level of harm and the appropriate punishment is within purview of Legislature"); *cf. United States v. Evans,* 333 U.S. 483, 486, 68 S.Ct. 634, 636, 92 L.Ed. 823 (1948) ("[D]efining crimes and fixing penalties are legislative, not judicial functions."). The power to charge persons with crimes and to prosecute those charges belongs to the executive department. Ky. Const. § 81 (governor to see that laws are faithfully executed); KRS 15.725(1) (Commonwealth's attorney to prosecute all criminal violations tried in circuit court). *Cf. United States v. Nixon,* 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974) ("Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."); *Moore v. Commonwealth,* Ky., 983 S.W.2d 479, 487 (1998) (prosecutor has broad discretion as to what crime to

> charge and what penalty to seek); *Commonwealth v. McKinney,* Ky.App., 594 S.W.2d 884, 888 (1979) (decision whether to prosecute and what charge to bring is within discretion of prosecutor). The power to conduct criminal trials, to adjudicate guilt, and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department. *People v. Pate,* 878 P.2d 685, 694 (Colo.1994) (en banc) (judiciary has exclusive power to impose sentences within limits determined by legislature); *People v. Spegal,* 5 Ill.2d 211, 125 N.E.2d 468, 472 (1955) (judiciary determines how cases should be tried); *State ex rel. Bray v. Russell,* 89 Ohio St.3d 132, 729 N.E.2d 359, 362 (2000) (determination of guilt and sentencing of criminal defendant is solely within province of judiciary).

Hoskins v. Maricle, 150 S.W.3d 1, 11-12 (Ky. 2004), *as modified on denial of reh'g* (Dec. 16, 2004).

It is clear that the Lexington-Fayette Urban County Government was without power to establish Sec. 14-5 of the Code of Ordinances: Begging or soliciting alms or money prohibited, and therefore Mr. Champions "conviction" was a nullity and must be vacated by this Court.

II. THE ORDINANCE INFRINGES UPON THE FREEDOM OF SPEECH RIGHTS GUARANTEED CITIZENS BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND §8 OF THE KENTUCKY CONSTITUTION.

In addition to being unlawful as LFUCG had no authority to criminalize behavior not previously deemed criminal by the General Assembly, the ordinance constitutes an unconstitutional violation of the right to freedom of speech and expression pursuant to the First

Amendment of the United States Constitution and Section 8 of the Kentucky Constitution.

When considering whether government action constitutes a violation of the right to freedom of speech, First Amendment jurisprudence requires first determining the type of regulation and the type of expression being regulated.

"[T]he State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). The Appellee can forward no interest compelling enough to abridge Mr. Champion's right to freedom of speech and the ordinance is overbroad.

The Circuit Court, after reviewing federal decisions concerning restrictions on solicitation of aid, concluded that the ordinance at issue constituted a lawful restriction on free speech because it was narrowly-tailored as to location of restriction (roadways and intersections) and because the LFUCG had a compelling interest in regulating activities in the roadways because such affects public safety. (Opinion at 6, 9-10).

However, the Circuit Court failed to first consider whether the forum where the speech the government attempts to restrain is public or not. If the forum is public, greater deference must be given to the citizen espousing his right to freedom of speech. In *Hague v. Committee for Industrial Organization*, the United States Supreme Court made it clear

that public streets are the most public of public forums. 307 U.S. 496 (1939).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

307 U.S. at 515 (J. Roberts, concurring).

The Court, many years later, affirmed this view of the inviolate nature of free speech in public forums in *International Society for Krishna Consciousness, Inc. v. Lee,* even while finding an airport terminal is not such a forum. ("Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest.") 505 U.S. 672, 678 (1993). Clearly, the roadways of Lexington are a public forum and the proper review of any restrictions of speech uttered upon them should be strict scrutiny.

> For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a

> significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

As stated in *Perry,* the next consideration that a reviewing court must consider is whether the restrictions on speech in a public forum are content- neutral. In the present case, the Circuit Court found that the ordinance was content-neutral. (Opinion at 7, in Appendix at A). In so finding, however, the Circuit Court engaged in pretzel logic, finding that because there must be an exchange of money when solicitation of money is concerned, it may be regulated speech, but stating that when one is engaging in speech where one is handing literature TO passersby, such speech may not be regulated. Such holding makes little practical sense—if it is the hand-to-hand transaction that impinges public safety, as the Opinion suggests, then all hand-to-hand transactions must be considered the same. One cannot parse out political speech where one might pass a handbill to a passerby as acceptable and label soliciting money where a passerby might hand cash to a needy person as unacceptable. Doing so is regulating speech based upon its conduct and requires a strict-scrutiny review, rather than the intermediate scrutiny that the Circuit Court applied. Thus, the Circuit Court erroneously held that the ordinance was content-neutral.

Of course, the title of the ordinance clearly shows the intent of the Urban County Government, which clearly was to suppress begging for

money assistance on the streets of Lexington. The title of the ordinance is "Begging or soliciting alms or money prohibited." Thus, the content of speech—requesting financial assistance—is forbidden and the ordinance is not content-neutral.

Chief Justice Roberts has expressed, "[c]onsistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is 'very limited.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (*quoting United States v. Grace*, 461 U.S. 171, 177 (1983)).

In the recent case of *Reed v. Town of Gilbert,* the United States Supreme Court, Justice Thomas writing, held:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
>
> 576 U.S. ___), 135 S.Ct. 2227 (2015), citations omitted.

Further, the citizens of Lexington should not be allowed to shield themselves from the whole society in which they live through the actions

of city leaders. The personal request for assistance from one's fellow man "should be accorded the highest level of First Amendment protection. The beggars' message, and indeed their very presence, contributes to the interchange of ideas regarding homelessness. Their presence and activities also convey the truthful information that American citizens are living as destitute, homeless castaways." Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 275 (1994).

Beggars actually serve a public good, particularly in a country as bountiful as ours. "[T]he presence of beggars makes it impossible for [people] to be oblivious to the poverty in their midst." Jonathan Mallamud, *Begging and the First Amendment*, 46 S.C. L. REV. 215, 217 (1995). One could even quantify the request for assistance as "political speech," traditionally given the most deference, as requests for assistance are a social commentary on the results of political decisions to many less-fortunate citizens.

The late Judge Boyce Martin of the Sixth Circuit Court of Appeals, wrote in *Speet v. Schuette*, that panhandling is clearly protected speech:

> We agree with the Seventh Circuit's reasoning that "*Schaumburg* provides the appropriate standard to analyze" whether the First Amendment protects begging. *Gresham*, 225 F.3d at 904–05. *Gresham* analogized panhandlers to the charity in *Schaumburg*, saying that "[l]ike the organized charities, [the panhandlers'] messages cannot always be easily

> separated from their need for money." *Id.* at 904. The *Gresham* panel concluded by saying that "[w]hile some communities might wish for all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support." Id. (*citing Schaumburg*, 444 U.S. at 632, 100 S.Ct. 826). We further agree with *Gresham's* observation that "[i]ndeed, the Court's analysis in *Schaumburg* suggests little reason to distinguish between beggars and charities in terms of the First Amendment protection for their speech." *Id.*

726 F.3d 867, 875 (6th Cir. 2013).

The Circuit Court clearly erred in holding that the ordinance was not content-based as it simply prohibits the request for mercy and charity by a needy person while situated in the public forum of the city street.

The Circuit Court clearly erred in holding that even though city streets are a public forum, intermediate scrutiny was the correct standard to apply. United States Supreme Court jurisprudence clearly requires the application of strict scrutiny.

The Circuit Court clearly erred in holding that a significant government interest allowed the restriction of free speech in a public forum by the ordinance and compounded that error by holding that other fora were available to those soliciting alms when restricted from so soliciting on the streets of the county. (Opinion at 10-11). The Circuit Court suggested that sidewalks and private property were available to the

poor for solicitation, but the sidewalks are of the same character of public fora as roadways and are just adjacent to such, and private property is not for the government to regulate; it does not make government action constitutional to suggest that the prohibited activity can be performed where the government has no authority to prohibit the activity.

If the citizens of this great Commonwealth chose, through their duly-elected representatives, to criminalize poverty in this manner, a statute would have been enacted. However, the citizens have no such desire. Most of us can spare a dime for our fellow man. The citizens of Lexington deserve the opportunity to be gracious and humane, just like the citizens of every other locality.

The Circuit Court erroneously held that the ordinance was not a violative restriction of freedom of speech and expression protected by the First Amendment and Section 8. The conviction must be vacated and the ordinance struck down.

CONCLUSION

Based on the foregoing, Dennis Champion respectfully requests this Court to reverse the Circuit Court and vacate his conviction and strike down the ordinance as an unconstitutional restriction of free speech.

Respectfully submitted,

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